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MANIKUMAR SINNAPAN & ORS v. PP

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
AHMAD MAAROP FCJ
HASAN LAH FCJ
B ABU SAMAH NORDIN FCJ
ZAHARAH IBRAHIM JCA
[CRIMINAL APPEALS NO: 05-81-05-2012, 05-151-07-2013, 05-152-07-2013 & 05-106-04-2014]
17 NOVEMBER 2015

C

CRIMINAL LAW: *Penal Code – Sections 34, 302 & 307 – Murder and attempted murder – Defence – Whether acceptable – Sequence of events – Whether consistent with testimony of witness who was present during commission of crime – Credibility of witness – Whether challenged – Common intention – Whether proved –* D *Pre-arranged plan to commit offence – Existence of prior participation or meeting of minds between accused persons – Whether prosecution proved case beyond reasonable doubt*

The appellants ('OKT1, OKT2, OKT3 and OKT4') were charged with an offence under s. 302 of the Penal Code read together with s. 34 of the same E Code in respect of the death of one Heng Pang Kiat ('Heng'). They were also charged with an offence under s. 307 of the Penal Code read together with s. 34 of the same Code for the attempted murder of one Chong Chiew Nam ('Chong'). It was revealed that an arrangement was made between Chong and Foo where the latter paid an up-front payment of RM200,000 to Chong for F a certain matter and a deposit of RM300,000 was placed in a safe deposit box in a bank under the joint names of Chong and one Jagjeet Singh, an employee of Foo. Heng, a good friend of Chong, had successfully persuaded the latter to withdraw the deposit sum from the bank and the duo took their respective shares from the said money. The series of events eventually led to the G abduction and incarceration of both Chong and Heng. Chong and Heng were abducted and confined in a condominium for days where they were guarded by PW15, PW21, OKT2 and OKT3. On the fateful night of 20 February 2002, OKT4 brought Chong and Heng down and entered into a taxi driven by OKT1. At the security gate of the condominium complex, OKT2 boarded the taxi and sat at the rear together with Chong and Heng. Prior to that, it H was in evidence that OKT1 went to a computer shop and purchased a roll of cellotape and thereafter, went to another shop to purchase a foot long knife and a pair of gloves. The taxi proceeded to the highway and thence, to a trunk road. The taxi stopped at two stopovers and proceeded to the third stopover where OKT1, OKT2 and OKT4 alighted from the taxi. At this time, both I Heng and Chong's hands were tied and their mouths were taped with the

cellotape. OKT2 and OKT4 pulled Heng out of the taxi but several minutes later, they returned to the taxi without Heng. At the fourth stopover, Chong was dragged out from the taxi and OKT1 approached Chong with a knife and slashed him on the front rear of the neck. Believing that Chong was dead, OKT1, OKT2 and OKT4 left the scene. The following day, Heng's body was found with a slit neck. The High Court Judge found the appellants guilty and sentenced them to death for committing murder and 20 years' imprisonment for attempted murder. The Court of Appeal dismissed the appellants' appeals. Hence the present appeal. OKT1 submitted that Chong's evidence was tailored to favour himself and there was no evidence to link OKT1 to Foo. OKT2 and OKT4 submitted that (i) there was no maximum evaluation of Chong's evidence; and (ii) the rights of OKT2 to have a fair trial was compromised when the trial judge ruled that the evidence of OKT2 that he was elsewhere was inadmissible on account that no notice of alibi was given. OKT3 submitted that (i) the prosecution had not sufficiently proved the common intention of OKT3 on the two charges; and (ii) there was no cogent evidence to indicate that there was any prior participation or meeting of minds (consensus *ad idem*) between OKT3 and the other three accused persons.

Held (dismissing appeal)
Per Md Raus Sharif PCA delivering the judgment of the court:

(1) The trial judge did not make any wrong inference on the facts before him. The trial judge paid heed to Chong's remarkable recollection of the events. Among others, Chong was right on the date that Heng was abducted. Chong was a credible witness and his account of the events leading to the abduction, incarceration and infliction of injuries to Heng, as well as to himself, was consistent with what happened as detailed by him and established in the context of the totality of the evidence adduced by the prosecution, upon a maximum evaluation. Chong was also perceptive and attentive enough to relate that there was a foot long knife, tape and a glove, details of which were supported by evidence of the items purchased by OKT1 just hours before the incident. Further, Chong's evidence was wholly corroborated by PW15 and PW21. (paras 41-43)

(2) There was full participation by OKT1, OKT2 and OKT4 in the act perpetrated against Heng at the third stopover and Chong at the fourth stopover. As against the highly incriminating evidence, there was nothing in OKT1, OKT2 and OKT4's defence and their explanation to exculpate them from criminal liability. Although there was no direct evidence as to who in fact slit Heng's throat, the inescapable inference is that it was OKT1, OKT2 or OKT4, as they had returned to the taxi without Heng after having dragged him out of the taxi at the third

stopover. The inescapable conclusion was that the act and conduct of OKT1, OKT2 and OKT4 at the scene of the crime was wholly consistent with a pre-arranged plan. Their acts were definitely done in concert. (paras 44-46)

(3) Common intention within the meaning of s. 34 of the Penal Code implies a pre-arranged plan and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. On the facts, it was not in dispute that OKT3 was not at the scene when the crime against Heng and Chong was committed. However, the existence of *mens rea* and common intention among OKT3 and OKT1, OKT2 and OKT4 could be seen or inferred from the sequence of events as found by the trial judge. (paras 51 & 52)

(4) Chong and Heng were abducted and incarcerated on account of money taken by them that belonged to Foo. Among others, OKT3 witnessed Foo's assault of Chong. Further, the conduct of OKT3 was intricately interwoven with the conduct of OKT1, OKT2 and OKT4 so as to prove his culpability in the commission of the offence. OKT3 was in communication with OKT1 on 20 February 2002 and had instructed PW15 and PW21 to release Chong and Heng to OKT1. (paras 55 & 56)

(5) There was no reason to disturb the trial judge's findings that OKT3 had no defence and that at the end of the entire case, there was no doubt that the act was committed with the common intention of OKT3, such that the act although not executed by OKT3, must also be ascribed to OKT3. OKT3 played a principal role in Chong and Heng's abduction and incarceration. There could be no doubt that the trial judge correctly found that both charges had been proved against OKT3 beyond reasonable doubt. There was more than sufficient evidence to show the existence of a pre-arranged plan between OKT1, OKT2, OKT3 and OKT4. (paras 56 & 57)

Bahasa Malaysia *Headnotes*

Perayu-perayu ('OKT1, OKT2, OKT3 dan OKT4') dituduh melakukan kesalahan bawah s. 302 Kanun Keseksaan dibaca bersama-sama s. 34 Kanun yang sama bagi kematian individu bernama Heng Pang Kiat ('Heng'). Mereka juga dituduh melakukan kesalahan bawah s. 307 Kanun Keseksaan dibaca bersama-sama s. 34 Kanun yang sama atas cubaan membunuh seorang bernama Chong Chiew Nam ('Chong'). Dihujahkan bahawa satu rancangan dibuat antara Chong dan Foo dan Foo membayar wang sebanyak RM200,000 kepada Chong bagi pelaksanaan satu perkara dan deposit sebanyak RM300,000 dimasukkan ke dalam peti simpanan selamat sebuah bank bawah nama Chong dan Jagjeet Singh, seorang pekerja Foo. Heng, kawan

baik Chong, berjaya memaksanya mengeluarkan wang deposit tersebut dari bank dan membahagikan wang tersebut sesama mereka. Kejadian selepas itu membawa kepada culikan dan penahanan kedua-dua Chong dan Heng. Chong dan Heng diculik dan ditahan di dalam sebuah kondominium untuk beberapa hari dan dikawal oleh PW15, PW21, OKT2 dan OKT3. Pada malam 20 Februari 2002, OKT4 membawa Chong dan Heng ke bawah dan menaiki sebuah teksi yang dipandu oleh OKT1. Di pagar keselamatan kondominium tersebut, OKT2 menaiki teksi OKT1 dan duduk di bahagian belakang bersama-sama Chong dan Heng. Keterangan menunjukkan sebelum itu, OKT1 singgah di sebuah kedai komputer untuk membeli segulung pita pelekat dan selepas itu, pergi ke kedai lain untuk membeli pisau berukuran satu kaki dan sepasang sarung tangan. Teksi terus menuju ke lebuh raya dan kemudian ke jalan utama. Teksi tersebut berhenti di dua persinggahan dan meneruskan perjalanan sehingga ke persinggahan ketiga dan OKT1, OKT2 dan OKT4 keluar dari teksi tersebut. Ketika itu, kedua-dua tangan Heng dan Chong diikat dan mulut mereka ditutup dengan pita pelekat. OKT2 dan OKT4 mengheret Heng keluar dari teksi tetapi selepas beberapa minit, mereka kembali semula ke teksi tanpa Heng. Di persinggahan keempat pula, Chong diheret keluar dari teksi dan OKT1 menghampirinya dengan sebilah pisau dan mengelar bahagian lehernya. Mempercayai Chong telah mati, OKT1, OKT2 dan OKT4 meninggalkan tempat kejadian. Keesokan harinya, mayat Heng dijumpai dengan lehernya terkelar. Hakim Mahkamah Tinggi mendapati perayu-perayu bersalah dan menjatuhkan hukuman mati kerana melakukan pembunuhan dan 20 tahun penjara untuk cubaan membunuh. Mahkamah Rayuan menolak rayuan perayu-perayu. Oleh itu rayuan ini. OKT1 menghujahkan bahawa keterangan Chong direka untuk memihaknya dan tiada keterangan untuk mengaitkan OKT1 dengan Foo. OKT2 dan OKT4 menghujahkan (i) tiada penilaian maksima dibuat terhadap keterangan Chong; dan (ii) hak OKT2 untuk mendapat perbicaraan adil terjejas apabila hakim bicara memutuskan keterangan OKT2 bahawa dia berada di tempat lain tidak diterima memandangkan notis alibi tidak dikemukakan. OKT3 pula menghujahkan (a) pihak pendakwaan tidak membuktikan niat bersama OKT3 bagi kedua-dua tuduhan tersebut; dan (b) tiada keterangan yang menunjukkan penyertaan awalan atau pertembungan minda (consensus *ad idem*) antara OKT3 dan ketiga-tiga tertuduh lain.

Diputuskan (menolak rayuan)

Oleh Md Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara tidak membuat anggapan salah terhadap fakta yang dikemukakan di mahkamah. Hakim bicara telah mempertimbangkan keupayaan Chong untuk mengingat kembali kejadian yang berlaku. Antara lain, Chong menyatakan tarikh Heng diculik dengan betul. Chong adalah saksi yang boleh dipercayai dan ingatannya berkenaan penculikan, penangkapan dan kecederaan yang berlaku pada Heng dan

Chong, konsisten dengan apa yang berlaku dan dibuktikan melalui keterangan yang dikemukakan oleh pihak pendakwaan, atas penilaian maksima. Chong juga memberi perhatian dan berupaya mengaitkan kehadiran pisau berukuran satu kaki, pita pelekat dan sarung tangan, maklumat yang disokong oleh keterangan bagi item-item yang dibeli oleh OKT1 sebelum kejadian. Tambahan lagi, keterangan Chong disokong sepenuhnya oleh PW15 dan PW21.

(2) OKT1, OKT2 dan OKT4 telah mengambil bahagian penuh dalam tindakan yang dilakukan terhadap Heng di persinggahan ketiga dan Chong di persinggahan keempat. Bagi menyangkal keterangan yang tidak memihak mereka, tiada apa-apa dalam pembelaan atau pun keterangan OKT1, OKT2 dan OKT4 telah mengecualikan mereka daripada kesalahan jenayah yang dilakukan. Walaupun tidak terdapat keterangan nyata berkenaan siapa yang mengelar tekak Heng, anggapan yang tidak boleh disangkal adalah OKT1, OKT2 dan OKT4 yang melakukannya, memandangkan mereka kembali ke teksi tanpa Heng selepas mengheretnya keluar daripada teksi di persinggahan ketiga. Kesimpulan yang tidak boleh dinafikan adalah bahawa tindakan dan kelakuan OKT1, OKT2 dan OKT4 di tempat kejadian konsisten dengan pelan yang dirancang sebelum kejadian. Kelakuan mereka sememangnya dibuat bersekali.

(3) Niat bersama dalam takrif s. 34 Kanun Keseksaan merujuk pada pelan yang dirancang sebelum kejadian dan untuk mensabitkan tertuduh atas kesalahan mengguna pakai seksyen ini, perlu dibuktikan bahawa kelakuan jenayah dibuat bersama menurut pelan yang dirancang. Berdasarkan fakta, tidak boleh dinafikan bahawa OKT3 tidak ada di tempat kejadian apabila jenayah terhadap Heng dan Chong dilakukan. Walau bagaimanapun, kewujudan *mens rea* dan niat bersama antara OKT3 dan OKT1, OKT2 dan OKT4 boleh dilihat atau disimpulkan daripada rantai peristiwa seperti didapati oleh hakim bicara.

(4) Chong dan Heng diculik dan ditahan atas alasan mereka telah mengambil wang kepunyaan Foo. Antara lain, OKT3 telah menyaksikan serangan Foo terhadap Chong. Tambahan lagi, kelakuan OKT3 terikat dengan kelakukan OKT1, OKT2 dan OKT4 untuk membuktikan penglibatannya dalam kesalahan tersebut. OKT3 berkomunikasi dengan OKT1 pada 20 Februari 2002 dan mengarahkan PW15 dan PW21 untuk melepaskan Chong dan Heng kepada OKT1.

(5) Tiada alasan untuk mengganggu dapatan hakim bicara bahawa OKT3 tidak mempunyai pembelaan dan bahawa pada akhir keseluruhan kes, tiada keraguan bahawa perbuatan tersebut dilakukan dengan niat bersama OKT3, walaupun perbuatan itu tidak dilaksanakan oleh OKT3, perlu dikaitkan kepada OKT3. OKT3 memainkan peranan utama dalam

penculikan dan penahanan Chong dan Heng. Tiada keraguan bahawa hakim bicara telah memutuskan dengan betul bahawa kedua-dua tuduhan telah dibuktikan terhadap OKT3 melampaui keraguan munasabah. Terdapat lebih daripada cukup keterangan untuk menunjukkan kewujudan pelan yang dirancang sebelum kejadian antara OKT1, OKT2, OKT3 dan OKT4.

Case(s) referred to:
Chandrasekaran & Ors v. PP [1970] 1 LNS 11 HC ***(refd)***
Hasamuddin Talena v. PP [2002] 2 CLJ 504 CA ***(refd)***
Lee Choon Chee v. PP [1996] 1 SLR 264 ***(refd)***
Mahbub Shah v. King Emperor AIR 1945 PC 118 ***(refd)***
Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA ***(refd)***
Ong Chee Hoe v. PP [1998] 4 SLR 688 ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Basri Salihin [1993] 1 CLJ 420 HC ***(refd)***
PP v. Kanapathy Kupusamy & Anor [2001] 1 CLJ 61 HC ***(refd)***
PP v. Tai Mei Yuen [2004] 1 LNS 442 HC ***(refd)***
R v. Johnson [1995] 2 Cr App R 1 ***(refd)***
Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***
Sum Kum Seng v. PP [1981] 1 LNS 76 FC ***(refd)***
Vasan Singh v. PP [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 SC ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180, 402A
Evidence Act 1950, s. 27
Penal Code, ss. 34, 302, 307

For the 1st appellant - K Viknesvaran; M/s Viknes Ratna & Co
For the 2nd & 4th appellants - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the 3rd appellant - Abdul Hamid Menon Abdullah; M/s RK Menon & Co
For the respondent - Mazelan Jamaludin; DPP

[Editor's note: For the Court of Appeal judgment, please see Manikumar Sinnappan & Ors v. PP [2012] 1 LNS 1415 (affirmed).]

Reported by Kumitha Abd Majid

JUDGMENT

Md Raus Sharif PCA:

Introduction

[1] This is an appeal by the appellants against the decision of the Court of Appeal dated 18 April 2012 in dismissing the appellants' appeals against the decision of the High Court.

[2] At the High Court, the appellants were charged with an offence under s. 302 read together with s. 34 of the Penal Code in respect of the death of one Heng Pang Kiat. They were also charged with an offence under s. 307 read together with s. 34 of the Penal Code for the attempted murder of one Chong Chiew Nam @ Chong Chee Wah. The charges preferred against the appellants read as follows:

> First Charge
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> Bahawa kamu bersama-sama Foo Sam Ming @ Poo Sin Min (yang telah meningal dunia pada 21.3.2002) pada 21.2.2002 di antara jam 12.01 dan 2.00 pagi di tepi Jalan KM 31.5 Jalan Kota Tinggi-Kluang di-dalam daerah Kluang dalam Negeri Johor Darul Takzim dengan niat bersama telah melakukan kesalahan bunuh dengan menyebabkan kematian Heng Pang Kiat (K/P No. 630805-01-5047) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dibacakan bersama Seksyen 34 Kanun yang sama.
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> Second Charge
>
> Bahawa kamu bersama-sama Foo Sam Ming @ Poo Sin Min (yang telah meningal dunia pada 21.3.2002) pada 21.2.2002 di antara jam 12.01 dan 2.00 pagi di tepi Jalan KM 8 Jalan Kota Tinggi-Kluang di-dalam daerah Kluang dalam Negeri Johor Darul Takzim dengan niat bersama telah melakukan perbuatan yang menyebabkan kecederaan kepada Chong Chiew Nam @ Chong Chee Wah (K/P No. 430802-085115) yang mana sekiranya perbuatan kamu itu menyebabkan kematian maka kamu akan bersalah bagi kesalahan membunuh. Oleh itu demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 307 Kanun Keseksaan dibacakan bersama Seksyen 34 Akta Kanun yang sama.

[3] After a full trial, the High Court Judge (trial judge) found the appellants guilty of the first charge of murder and accordingly convicted and sentenced them to death. The appellants were also found guilty and convicted on the second charge for attempted murder and were sentenced to 20 years' imprisonment from the date of arrest.

[4] The appellants' appeals to the Court of Appeal were dismissed. Hence, their appeals to this court. We heard their appeals and adjourned the matter for decision. We now give our decision and reasons for the same.

[5] In this judgment, we will refer to the appellants as they were referred to in the High Court, namely OKT1, OKT2, OKT3 and OKT4.

Background Facts

[6] The facts relevant to the issues raised in this appeal are briefly as follows: Chong Chiew Nam @ Chong Chee Wah, (PW14) (Chong) the victim in the second charge, was a former government servant attached to the High Court. Later, he worked as a business partner and a manager in a legal firm. Chong testified that Foo Sam Ming (Foo) an advocate & solicitor, who was also a businessman and a former police officer, was involved personally in

a civil litigation brought against him by a firm of architectural and development consultants. Having lost the civil suit in the High Court, Foo filed an appeal to the Court of Appeal.

[7] Thereafter, Foo approached Chong to arrange for a favourable outcome in the Court of Appeal by fixing a suitable Coram that would decide in his favour. Foo agreed to pay Chong RM10,000. After the appeal was heard and while the decision was pending, Foo again approached Chong and asked whether Chong could arrange a favourable decision. Foo offered to pay an up-front payment of RM200,000 and a deposit of RM300,000 in Oriental Bank Johor Bahru as consideration for a favourable decision.

[8] Chong collected the up-front payment of RM200,000 from Foo in Ampang Condominium, Kuala Lumpur. On 26 August 2000, a RM300,000 deposit was placed by Foo in a safe deposit box in Oriental Bank, Johor Bahru in the joint name of Chong and Jagjeet Singh a/l Mewa Singh (PW13), an employee of Foo.

[9] While the decision of the Court of Appeal was still pending, Heng Pang Kiat (Heng), a good friend of Chong, managed to persuade Chong to withdraw the deposit, with the help of a Sikh imposter. They deceived the Oriental Bank's officer who allowed them to open the safe deposit box and take out the RM300,000 from the safe deposit box. RM107,000 was taken by Heng and the balance by Chong who thereafter gambled it away.

[10] The series of events that unfolded eventually led to the unfortunate abduction and incarceration of both Chong and Heng. On 12 January 2002 Chong was abducted while he was in Kuala Lumpur. He was then incarcerated for days at two different places in Johor Bahru. Heng was abducted on the eve of Kuala Lumpur City Day, thereafter he was confined together with Chong in the condominium in Pasir Gudang for days. Tanabalan a/l Thangarajoo aka "Boy" (PW15), Satiyan a/l Selvem (PW21) and OKT3 were the principal persons who guarded them at the Pasir Gudang Condominium, joined later by OKT2.

[11] It is in evidence that on the fateful night of 20 February 2002, PW15 received a call on his cell phone. PW15 and PW21 then asked Chong and Heng to clean up the condominium and to dress. PW15 and PW21 told them that they would be sent to Kuala Lumpur. Thereafter, OKT4 came up to the condominium and brought Chong and Heng down. A taxi, with the registration number HJ 4847, was waiting. It was about 10 or 11 o'clock at night. The driver of the taxi was OKT1. Heng was not able to walk then. PW15 and PW21 carried Heng into the taxi. OKT4 was seated in front, next to the driver (OKT1).

[12] Now, to digress a little from the above narrative, it is in evidence that OKT1 went to a computer shop on 20 February 2002 at 7pm and purchased from one Yap Siau Ying (PW18), a computer shop assistant, a roll of

A cellotape (P1OH). PW18 identified OKT1 at the identification parade held on 9 March 2002. Another witness, Yeo Chai Cheng (PW19), a vendor of household utensils, testified that OKT1 came to his shop at 7.30pm on 20 February 2002 and purchased a foot long knife and a pair of gloves. He identified OKT1 at an identification parade held on 9 March 2002.

B **[13]** Now, back to the events on the night of 20 February 2002. At the security gate of the condominium complex, OKT2 boarded the taxi and sat at the rear together with Chong and Heng. The taxi proceeded to the highway and thence to a trunk road. About 20 minutes later, the taxi stopped (first stopover) and OKT4 got out of the taxi and took something from the boot. C Upon OKT4's return, OKT4 passed a length of broad cellotape, which was about three inches wide to OKT2 who then tied the hands and taped the mouths of Heng and Chong with that tape before proceeding further.

[14] About 30 minutes later, the taxi stopped (second stopover) and OKT4 passed a knife, about one foot long, to OKT1 who was wearing a glove. The D taxi proceeded and then stopped (third stopover), and OKT1, OKT2 and OKT4 alighted from the taxi. OKT2 and OKT4 pulled Heng out of the taxi. Fifteen minutes later, OKT1, OKT2 and OKT4 returned to the taxi without Heng.

E **[15]** In the taxi, OKT2 informed Chong, who was pleading for his life, that "they" would not harm Chong but would take Chong to Kuala Lumpur. 15 minutes later, the taxi stopped (fourth stopover) and OKT1, OKT2 and OKT4 alighted from the taxi. OKT2 and OKT4 dragged Chong out of the taxi and pressed him down onto the side of the road. OKT1 approached Chong with a knife and slashed him on the front and rear of the neck but he managed F to roll down the slope. OKT1, OKT2 and OKT4 chased after Chong. Chong "played possum", and OKT1, OKT2 and OKT4 said "confirm" and then left the scene.

[16] On 21 February 2002, Detective Corporal Murugiah a/l P Maniam (PW22) arrested OKT1. Inspector Abd Hamid bin Abd Rahaman (PW12) G read the caution in Malay to OKT1. PW22 translated the caution in Tamil to OKT1. According to PW22, OKT1 said "itu orang Cina kena potong, saya, Sasi dan Ramesh ada buang dekat Jalan Kota Tinggi tepi divider, saya guarantee tahu, boleh kasi tunjuk", and PW12 recorded those words on a piece of paper. PW12 then proceeded, with a police party that included H PW22 and Chief Inspector Mohd Shah bin Kamaruddin (PW23), with OKT1, to Jalan Kota Tinggi.

[17] Both sides of the road were searched from KM 25 to KM 31.5. It was dark, but at KM 31.5, the police detected blood on the ground. An hour later, PW12 found a dead body. It was the body of a Chinese male, with slit I neck, mouth taped with cellotape, and hands tied at the back with cellotape. PW22 and PW23 escorted OKT1 to the dead body. It was the dead body of Heng. When ASP Sulaiman bin Hamid (PW24) arrived at the scene about 4am, he (PW24) instructed the body to be sent to the mortuary.

[18] Pertinent to highlight here that the trial judge conducted a voir dire on the evidence adduced by OKT1 which led to the discovery of the dead body. At the end of the voir dire, the trial judge was satisfied that all conditions for admission of the evidence were satisfied. The alleged information was admitted in evidence under s. 27 of the Evidence Act 1950.

[19] Now, back to the narrative. On 22 February 2002, about 11am, a government pathologist, Dr Shahidan bin Mohd Noor (PW8) conducted a post-mortem on Heng. From the external examination, PW8 found an incised horizontal wound, measuring 18 x 5 x 4 cm, at the front of the neck which had severed the thyroid cartilage below the notch. There were larvae in the cavity. From internal examination, PW8 found that the right stern mastoid muscles and right carotid artery were severed. There was a fracture of the fifth rib. There was soft tissue bleeding in the brain space. The cause of death was the wounds, caused by a sharp blade, on the neck. PW8 opined that the time of death would have been within 24 hours of the post mortem that is around 11am on 21 February 2002. PW8 related that he collected blood, hair and nail samples, and that he handed a bag containing those samples, in bottles, to PW23.

[20] In relation to the exhibits, a government chemist Abdullah bin Mohd Yusof (PW11) testified that the knife (P7A) was free of blood stains, that the earth and leaf sample (P8B) contained traces of group "0" human blood, that the bottle (P9A) contained group "0" human blood, and that the two lengths of cellotape (P1OH) bore traces of group "0" human blood.

[21] At the close of the prosecution's case, the trial judge ruled that the court after having subjected the evidence before it in its totality to maximum evaluation under s. 180 of the Criminal Procedure Code, was satisfied that the prosecution had established a *prima facie* case against OKT1, OKT2, OKT3 and OKT4 on both charges. They were ordered to enter upon their defence.

Defence Case

[22] At the defence stage, OKT1, OKT2, OKT3, and OKT4 elected to testify under affirmation ("oath").

[23] OKT1's defence was essentially that he had nothing to do with whatever that took Heng's life and caused Chong's injuries. OKT1 testified he was a taxi driver. He first met Chong when he drove him to the Blue Wave Hotel, Johor Bahru. In tow were PW15 (Boy), PW21 (Sathia) and one Raja. Thereafter, from the Blue Wave Hotel, PW15 (Boy) instructed OKT1 to drive them to the condominium at Pasir Gudang.

[24] According to OKT1, sometime in January 2002, OKT1 received a call from PW15 who asked him (OKT1) to drive a van to the condominium. OKT1 did so, as PW15 said he would pay him (OKT1). Six persons (OKT1, Chong, PW15, PW21, Raja and two others) were in the van and the van

proceeded to Kuala Lumpur. In Kuala Lumpur, OKT1 parked the van near a shop. He waited in the van, while the others proceeded to somewhere else. An hour later, the others returned with another Chinese person (Heng). Thereafter, PW15 directed him to drive them back to the condominium at Pasir Gudang. He did as directed.

[25] OKT1 further testified that in February 2002, OKT1 again met Chong at the car park of the condominium complex at Pasir Gudang. According to him, he went there as PW15 had telephoned and instructed him to come to the condominium. When he arrived at the condominium at Pasir Gudang, he telephoned and informed PW15 of his arrival. PW15 and PW21 (Sathia) helped Heng into his taxi. Chong walked unaided to his taxi. With both insides, PW15 instructed OKT1 to drive Chong and Heng to the police station. After he had driven for a short distance, Chong asked for his (OKT1) telephone. He handed his telephone to Chong and Chong had a telephone conversation in Chinese. Chong then directed him not to drive them to the police station but to Kluang. He told Chong that his taxi could not enter Kluang but Chong instructed him to drive on. Thereafter, OKT1 dropped Chong and Heng somewhere along the road from Pasir Gudang to Kluang.

[26] OKT1 further testified that he was apprehended by the police on the next day where he was taken to several police stations. According to him, he was repeatedly assaulted and interrogated as to whether he had committed any homicide. He did not admit to any crime. Later, the police asked him to take them to the condominium. On the way to the condominium, the police received a telephone call. The police inspector present then instructed the police driver to proceed to another place. That police inspector said that the body had been found. OKT1 was brought to the place where the body was found to identify the body. He kept quiet when he was shown the body. Thereafter, he was taken to the condominium complex at Pasir Gudang. A police inspector asked him to identify the condominium. He did not do so.

[27] OKT1 in his evidence denied purchasing any tape from Yap Siau Ying (PW18). He also denied having any knowledge of the knife (P7A).

[28] OKT2's defence was a total denial of any involvement in the crime committed against Heng and Chong. OKT2 testified that he was arrested in his house at Saleng, Kulai. He was taken to the Kulai Police Station, where he was assaulted. He was asked if he was Sasi and if he had done something to a Chinese person. He denied. He said that his name was Anand Nambiar, not Sasi. At the Kluang Police Station, he was interrogated and assaulted. He was asked to sign several documents. He took part in an identification parade. There, he met Chong for the first time, whom he had not seen before. According to him, for the entire night of 20 February 2002, he was at home watching television. He only left the house the next morning, about 9am or 10am, to have breakfast. He further testified that he was not acquainted with OKT1, OKT3 or OKT4.

[29] OKT3's defence was that he was in Singapore at the time of the commission of the crime against Heng and Chong. Nevertheless, he admitted doing some interrogation on Chong and Heng while they were confined at the condominium in Pasir Gudang. OKT3 testified that Foo was his employer. OKT3 admitted that while interrogating Chong and Heng about Foo's money he had hit Heng on two occasions. OKT3 further testified that on the night in question ie, 20 February 2002, while he was in Singapore, PW15 (Boy) telephoned him and asked him what to do with Chong and Heng. OKT3 advised PW15 to send them to the police station. According to OKT3, PW15 agreed to send Heng and Cong to the police station by taxi.

[30] OKT4's line of defence was that he did not commit the crime. In his evidence, OKT4 testified that he was a car repossessor. He was arrested by Inspector Raja Gopal, over the matter of a quarrel with his younger brother. Later, he was informed that he was wanted by the Kluang police. The next day, he was brought before the Kluang Magistrate. At the Kluang Police Station, he was informed that he had a homicide case. He denied his involvement. He further testified that he first saw Chong, PW15 and PW21 when they were in court. He only got to know OKT1, OKT2, and OKT3 in prison.

[31] At the end of the defence case, the trial judge after scrutinising all the defence evidence found that the defence had failed to cast a reasonable doubt against the prosecution's case. Accordingly, the trial judge convicted OKT1, OKT2, OKT3 and OKT4 against both the charges preferred against them.

Findings Of The Trial Judge

[32] This is what the trial judge had to say about OKT1's line of defence:

> ... the entire story of OKT1 was iffy. To take it from 20.2.2002, OKT1 denied OKT4 was at the condominium on the night in question. But it was PW15 and PW21's unchallenged evidence that the persons who came to take Chong and Heng were OKT1 and OKT4, and it was Chong's unchallenged evidence that OKT4 came to the condominium. OKT1 testified that PW15 telephoned and asked him to send Chong and Heng to the police station. But it was PW15's unchallenged evidence that he (PW15) enquired from OKT3 as to the place where Chong and Heng would be taken and OKT3 said "bawa pergi ke balai polis", and that he (PW15) enquired OKT1 as to place where Heng and Chong were being taken and OKT1 answered "ke balai polis" OKT1 denied that he drove out of the condominium complex with OKT4. But it was Chong and PW15's unchallenged evidence that OKT4 was with OKT1 as he (OKT1) drove out of the taxi. OKT1 denied that it was OKT2 whom he picked up. But it was Chong's unchallenged evidence that OKT2 entered the taxi outside the condominium complex. As for the events thereafter, OKT1 denied that the persons with him were OKT2 and OKT4. But it was Chong's unchallenged evidence that OKT2 and OKT4 were him. And Chong's evidence on the role that OKT1 played, from condominium to

Jalan Kota Tinggi, was not challenged by OKT1. The closest that OKT1 came to challenge Chong, was that Chong agreed that he did not see who "did it" to Heng, which was said anyway by Chong during examination-in-chief. Need it be said that the prosecution story was completely intact.

[33] In ruling that OKT2 was guilty as charged, this is what the trial judge had to say:

> OKT2 had not given any notice of his defence of alibi. The defence of alibi could not be admitted. Consequently, OKT2 had not given a version or any version to resist the case against him. OKT2 had not adduced any evidence of any sort to launch a reasonable doubt. There were the denials or "tak setuju". But that was not any defence. There was the testimony that OKT2 after arrest was assaulted by the police. But that, even if true, was no answer or sufficient answer to the *prima facie* case. It was submitted that OKT2 was only implicated by a singular witness, Chong. But Chong was not an untruthful witness. Furthermore, there was no reason for Chong to lie about the events from abduction to night in question. He was truthful about all his shady deals. He was honest about his larceny of Foo's money. It would not appear that Chong had anything to hide. Chong was in court only to testify on the offences committed against him and Heng. There was no reason for Chong not to tell the truth. But even if Chong had wrongly implicated him (OKT2), which was not the case, OKT2 had not challenged Chong or raised issue that it was not him (OKT2), throughout the duration of the trial. When all things were considered no prior notice, no challenge, no defence of any sort - there could be no question of OKT2 being mistakenly identified.
>
> Be that as it may, it ought to be noted that Chong was seated at the rear of the taxi together with OKT2 throughout the duration the journey from condominium to Jalan Kota Tinggi (except when OKT2 alighted from the taxi at the 3rd and 4th stopover), such that Chong had more than ample time and opportunity to register the features of the person seated next to him and indeed had "engaged in conversation" (Chong pleaded for his life and OKT2 responded that he (Chong) and Heng would be taken to Kuala Lumpur) with that person seated next to him. The lighting condition might not have been good. But eyes adjust to light, and the evidence was that there was street lighting at the 1st stopover. Assessed by the guidelines laid down in *R v. Turnbull* [1977] QB 224, the identification evidence of Chong could not not be good.
>
> Weight ought also to be given to the fact that OKT2 was identified by Chong at a police identification parade conducted on 25.2.2002 (see 128NP), just about 4 days after the incident, when things and events were fresh.
>
> It was submitted that it was unusual or unfair for both OKT1 and OKT2 to be in the same identification parade. But Chong could not have been confused by the presence of OKT1 and OKT2 at the one and same identification parade. The physical attributes of OKT1 and OKT2 were that different - OKT1 was short (5' 5") and stout while OKT2 was pencil thin and tall (6' plus) (see 131NP) - that Chong could not have mistaken

one for the other. It was submitted that OKT2 was the only person in handcuffs at the parade. But with respect, it was unchallenged evidence that the handcuffs on OKT1 and OKT2 were removed when they were at the identification parade (see 129Np).

There was no mistaken identity of OKT2. There was no defence from OKT2. There was no doubt on the *prima facie* case. At the end of the entire case, it was found that both charges were proved against OKT2 beyond all reasonable doubt. OKT2 was convicted as charged.

[34] Insofar as OKT3 was concerned, the trial judge found that nothing in OKT3's defence could dislodge the established evidence, either by some reasonable doubt or otherwise of OKT3's involvement. The salient pronouncement of the court as to OKT3's culpability was recorded as follows:

... the entire story of OKT3 that he was only marginally involved - only in some interrogation of Chong and Heng over Foo's money - could also not bear scrutiny

OKT3's defence was comprehensively evaluated, on its own and under the light of the entire evidence. But there was nothing adduced by OKT3 that could dislodge the established evidence, either by some reasonable doubt or otherwise. The entire evidence was considered, but the outcome was always the same. OKT3 was in communication with OKT1 on 20.2.2002. OKT3 had instructed PW15 and PW21 to release Chong and Heng to OKT1. Without OKT3's instruction to release Chong and Heng on 20.2.2002, Heng would have lived, at least to the next morning. Everything involved OKT3. Nothing had happened where OKT3 was not involved. It had to be the inescapable conclusion that OKT3 could have not been involved in the final act. In the end, the acts proved against OKT3 also proved that OKT3 had the requisite common intention.

There was no defence. At the end of the entire case, there was no doubt that the act at Jalan Kota Tinggi was committed with the common intention of OKT3, such that the act, although not executed by OKT3, must also be ascribed to OKT3. Both charges were proved against OKT3 beyond all reasonable doubt. OKT3 was convicted as charged.

[35] With regard to OKT4, the trial judge found that there could be no doubt that OKT4 was at the scene at the time as stated in the charges, and that OKT4 "did it" in concert with OKT1 and OKT2, and with the common intention of all the accused persons. This is what the trial judge had to say about OKT4's line of defence:

The logic behind that defence of OKT4 was that since he did not commit the stated crime, then he was not or so could not have been at the scene of the crime. But the following unchallenged evidence totally disproved the defence story that he was not there and or that he did not do it. Chong, PW15 and PW21 testified that OKT4 was at the condominium of the night of 20.2.2002. PW15 and PW21 testified that OKT4 came with OKT1 to the condominium on the night of 20.2.2002. Chong and PW15

testified that OKT4 was with OKT1 as the taxi drove away from the condominium with Chong and Heng. Once the taxi was out of the condominium complex, Chong was the only witness. Chong related (only the major details) that OKT4 passed the tape to OKT2 who then tied the hands and taped the mouths of Chong and Heng, that OKT4 passed a one foot knife to OKT1, that OKT2 and OKT4 dragged Heng out of the taxi at the 3rd stopover, that OKT1, OKT2 and OKT4 returned to the taxi without Heng, that OKT2 and OKT4 dragged Chong out of the taxi at the 4th stopover, that between them, OKT1, OKT2 and or OKT4 pressed Chong onto the ground and OKT1 approached Chong with a knife, that Chong was then slashed at the front and back of his neck (one measuring 6 cm by 4 cm, at the front of the neck), that OKT1, OKT2 and OKT4 gave chase as Chong rolled down the slope, and that OKT1, OKT2 and OKT4 said "confirm" before they departed. Chong might have been the only witness, but his account was totally unchallenged. Given so, there could be no doubt that OKT4 was at the scene, at the time as stated in the charges, and that OKT4 "did it" in concert with OKT1 and OKT2, and with the common intention of all 4 accused. OKT4 had failed to cast a reasonable doubt.

Court Of Appeal

[36] Aggrieved by the decision of the trial judge, OKT1, OKT2, OKT3 and OKT4 appealed to the Court of Appeal. The Court of Appeal in turn dismissed their appeals and upheld the findings of and convictions by the trial judge. The Court of Appeal was in agreement with the finding of the trial judge that none of the accused had cast any reasonable doubt on the prosecution's case and that the charges were proved beyond reasonable doubt. The Court of Appeal paid heed to the meticulous and immaculate examination of evidence of the prosecution and defence case undertaken by the trial judge. The reasoning of the Court of Appeal may be summarised as follows:

(a) It was immaterial who inflicted the fatal injury on Heng. The prosecution was relying on s. 34 of the Penal Code. Where a criminal act was done by several persons in furtherance of a common intention, each of such persons was liable for the criminal act as if it was done by him alone. Common intention was usually inferred from the act and conduct, if the inference was a necessary and compelling inference to establish the crime, and reasonably deducible from the circumstances of the case. Intention was a state of mind. Direct evidence of intention was almost impossible to establish, in the absence of any confession.

(b) At the close of defence, the trial judge observed that none of the accused had given any notice of his case when the prosecution presented its evidence. In the case of OKT2, he had not given any notice of his defence of alibi as required under s. 402A of the Criminal Procedure Code.

(c) The trial judge found Chong to be a truthful witness. He found that there was no reason for Chong to lie about all the events from the time of the abduction right up to the night in question. The trial judge rightly concluded, when all things are considered, that there was no prior notice, no challenge, and no defence of any sort, thus, there was no question of OKT2 being mistakenly identified.

(d) The trial judge found OKT3's story that he was only marginally involved, and even that was only in some interrogation of Chong and Heng, could not bear scrutiny. OKT3's denial that he interrogated Chong and Heng and assaulted them on more than one occasion or that Heng's injuries were caused by him, was opposite of the established evidence. There was no reason to disturb the trial judge's finding that OKT3 had no defence.

(e) OKT4's defence was that he was not at the scene at the stated time. Nevertheless, there was no notice of alibi. Based on the unchallenged evidence of the prosecution, the trial judge concluded that OKT4 was at the scene at the time stated in the charges, and participated in concert with OKT1 and OKT2, with the common intention of all the four accused. The trial judge's conclusion was tenable as OKT4 had failed to cast a reasonable doubt.

Federal Court

[37] The thrust of the submissions of learned counsel for OKT1 were as follows:

(a) Chong's evidence was very much tailored to favour himself. Reliance on such evidence without independent corroboration was totally prejudicial to OKT1. OKT1 was never in contact with nor has any interest in Foo. There was no evidence presented that OKT1 ever contacted Foo or Foo was an acquaintance of OKT1. It was never in evidence that OKT1 had received any large amount of money, neither did the police justify any motive for OKT1 to kill or hurt Chong or the deceased (Heng). Hence, the charges framed against OKT1 under s. 302 and s. 307 of the Penal Code were defective as there was no evidence to link OKT1 to Foo.

(b) The information under s. 27 of the Evidence Act 1950 as to what OKT1 allegedly said to PW22 did not come from OKT1 because PW22 (Detective Corporal Murugiah a/l P Maniam) did not record or write the exact words of the purported information by OKT1. PW22 spoke in Tamil to OKT1. There was no evidence or exhibits in the appeal record of any information collected by PW22 in Tamil. Although there is no legal requirement that a statement under s. 27 of the Evidence Act must be taken down in writing, as a matter of prudence it is highly desirable. Where the prosecution seeks to rely on information under the

provisions of s. 27 of the Evidence Act 1950, approximations are not permitted. The exact words spoken by the accused have to be proved. Cases of *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265; [1992] 1 MLJ 137; *PP v. Kanapathy Kupusamy & Anor* [2001] 1 CLJ 61; [2001] 5 MLJ 20; *Chandrasekaran & Ors v. PP* [1970] 1 LNS 11; [1971] 1 MLJ 153; *PP v. Tai Mei Yuen* [2004] 1 LNS 442; [2004] 4 MLJ 541; *Sum Kum Seng v. PP* [1981] 1 LNS 76; [1981] 1 MLJ 244; *PP v. Basri Salihin* [1993] 1 CLJ 420; [1994] 2 MLJ 476; and *Hasamuddin Talena v. PP* [2002] 2 CLJ 504; [2002] 2 MLJ 408 were cited as authorities to support the proposition.

(c) The other issues raised by learned counsel for OKT1 include the following:

(i) The deceased was beaten and so was Chong, but there was no trace of blood in the taxi. No strand of hair either;

(ii) The shopkeeper Yeo Chai Cheng (PW19) mentioned that OKT1 purchased a knife but in evidence he denied that what was exhibited in court came from his shop; and

(iii) No evidence to show Foo ever communicated with OKT1.

[38] The submissions of learned counsel for OKT2 and OKT4 in gist were as follows:

(a) There was no maximum evaluation of Chong's evidence. The trial judge ought to have cautioned himself in accepting Chong's evidence at face value. Chong's integrity as a truthful and reliable witness can be doubted because of his antecedents. He referred to us the case of *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389 in support of his submission.

(b) The fair trial rights of OKT2 had been compromised when the trial judge was too quick to rule that the evidence of OKT2 that he was elsewhere was inadmissible on account of no notice of alibi being given. The trial judge failed to recognise that if the evidence was inadmissible as alibi, it could still be admissible as a denial, as a defence of denial. The cases of *Vasan Singh v. PP* [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166; [1988] 3 MLJ 412; *Lee Choon Chee v. PP* [1996] 1 SLR 264 and *R v. Johnson* [1995] 2 Cr App R 1 were cited to support his submission.

(c) Learned counsel also attacked the competency of OKT2's counsel at the High Court. The incompetence was in relation to two areas: (i) that his counsel was incompetent in not serving the notice of alibi and not challenging the evidence of Chong that incriminated him; (ii) there was absolutely no challenge to those parts of Chong's evidence that implicated OKT2. He cited the case of *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93 to support his submission.

[39] The thrust of the submissions of learned counsel for OKT3 were as follows:

(a) That the prosecution had not sufficiently proven the common intention of OKT3 on the two charges. The trial judge had not at all considered the appropriate test to be applied when considering accomplice evidence. The trial judge had also seriously misdirected himself insofar as the drawing of inferences was concerned. To this end, counsel submitted that there was no cogent evidence to indicate that there was any prior participation or meeting of minds (consensus *ad idem*) between OKT3 and the other three accused persons. OKT3 was not part and parcel of the spontaneous common intention which had spontaneously developed amongst the other three accused persons, namely OKT1, OKT2 and OKT4.

(b) OKT3 could not be involved in such spontaneous common intention of the other three accused persons. OKT3 was said to have been in Singapore. There was no communication between OKT3 and the three other accused persons with regard to the alleged common intention, namely, to kill the two captives. To be involved in the common intention which had spontaneously developed amongst OKT1, OKT2 and OKT4, the presence and/or participation of OKT3 was vital. In this case, there was no evidence of such presence or participation. OKT3 was not physically present as and when such spontaneous common intention had developed amongst OKT1, OKT2 and OKT4.

(c) The trial court had adopted several presumptions against OKT3. The court had gone on to conclude that there was common intention on the part of OKT3 together with OKT1, OKT2 and OKT4. There were conjecture and speculation on the part of the trial court. The trial court and the Court of Appeal had fallen into error when looking at the evidence of the two witnesses, namely, PW15 (Tanabal a/l Thangarajoo) and PW21 (Satiyan a/l Selvem). They failed to consider the fact that the two were accomplices and thus their uncorroborated evidence ought to have been given the treatment and consideration which befits that of an accomplice. Both accomplices were not persons of high character.

Findings

[40] We have perused through the evidence in this case and, having done so, we are of the like view as the trial judge that the prosecution's case depended very much on the evidence of Chong.

That being the case, our duty is to ascertain whether Chong's evidence was credible. There is also another consideration namely, whether his evidence would be sufficient, upon maximum evaluation, and taken together with the

entire of the prosecution's evidence, to amount to a *prima facie* case in order to justify calling OKT1, OKT2, OKT3 and OKT4 to enter upon their defence on the two charges.

[41] Looking at the evidence proffered by the prosecution, we are unanimous that the trial judge did not make any wrong inference on the facts before him. The trial judge paid heed to Chong's remarkable recollection of the events. The trial judge noted that the first piece of information that he provided to the police was the registration plate number of the taxi. On that score, he was absolutely right, as the driver of that taxi (OKT1) had knowledge of the location of Heng's body, which showed that the taxi that Chong implicated was not unrelated to the events on the night in question. Chong was also right on the date that Heng was abducted, as a report of Heng's abduction was lodged on 1 February 2002.

[42] As for the events on the night in question, Chong was still perceptive and attentive enough to relate that there were a foot long knife, tape and a glove, which details were supported by evidence of the items purchased by OKT1 just hours before the incident. Chong was also absolutely right about the fact that Heng's hands were tied with tape and that Heng's mouth was taped, as Heng was indeed found in that state, and with a slit throat. And where Chong should be corroborated, he was wholly corroborated by PW15 (Tanabal a/l Tangarajoo) and PW21 (Satiyan a/l Selvem).

[43] Thus, like the Court of Appeal, we see no reason to disturb the trial judge's findings that Chong was a credible witness and that Chong's account of the events leading to the abduction, incarceration, and infliction of injuries to Heng, as well as to himself, was consistent with what had happened as detailed by him, and established in the context of the totality of the evidence adduced by the prosecution, upon a maximum evaluation.

[44] In our assessment, insofar as the appeal by OKT1, OKT2 and OKT4 was concerned, we agree with the finding of the Court of Appeal that based on the facts and evidence, there was full participation by OKT1, OKT2 and OKT4 in the act perpetrated against Heng at the third stopover and Chong at the fourth stopover. As against these highly incriminating evidence, there is nothing in OKT1, OKT2 and OKT4's defence and their explanation to exculpate them from criminal liability.

[45] Evidence clearly shows that OKT2 and OKT4 dragged Heng out of the taxi at the third stopover. OKT1, OKT2 and OKT4 came back to the taxi without Heng, who was found about 27 hours later, with slit throat, hands tied and mouth taped. The state of Heng's body with hands tied and mouth taped was the same as when OKT2 and OKT4 dragged Heng out of the taxi. Although there is no direct evidence as to who in fact slit Heng's throat, the inescapable inference is that it was OKT1, OKT2 or OKT4, as they had returned to the taxi without Heng after having dragged him out of the taxi at the third stopover.

[46] Based upon the totality of the evidence proffered by the prosecution in this case, the inescapable conclusion we draw is that the act and conduct of OKT1, OKT2 and OKT4 at the scene of the crime on the Kota Tinggi-Kluang road, was wholly consistent with a pre-arranged plan. Their acts were definitely done in concert. The evidence against OKT1, OKT2 and OKT4 was all direct, save where it touched upon the very act that caused death, which although circumstantial, was more than sufficient for an irresistible inference that OKT1, OKT2 and OKT4 were the ones who did it. OKT1 was present when OKT4 handed the tape to OKT2. OKT1 and OKT4 were present when OKT2 tied Heng's and Chong's hands and taped their mouths. OKT2 was present when OKT4 handed a knife to OKT1. OKT1 was present when OKT2 and OKT4 dragged Heng out of the taxi. And OKT1 and OKT2 and OKT4 returned to the taxi without Heng. There could be only one inference that could be drawn from the evidence, namely, that OKT1, OKT2 or OKT4 slit Heng's throat in the presence of the other two, in furtherance of the common intention of all, which intention must have been to kill by reason of the fact that the injury inflicted was to the neck or throat.

[47] To recapitulate, when the acts against Heng and Chong were viewed together, it was absolutely clear, beyond reasonable doubt, that the intention of OKT1, OKT2 and OKT4 was "to dispose of" Heng and Chong, and that OKT1, OKT2 and OKT4 acted in concert with that intention. The cumulative acts of OKT1, OKT2 and OKT4, from the point when Heng and Chong were driven from the condominium complex to the scene, and the manner in which the entire series of acts were executed - the purchase beforehand by OKT1 of the knife, tape and glove, the entry into the taxi by OKT2 after Heng and Chong were on board the taxi, the removal of the tape from the boot by OKT4, the passing of the knife by OKT4 to OKT1 who wore a glove, the binding of Heng's and Chong's hand by OKT2, the removal of Heng from the taxi by OKT2 and OKT4 in the presence of OKT1 who had stopped the taxi at the third stopover, the removal of Chong from the taxi by OKT2 and OKT4 in the presence of OKT1 who had stopped the taxi at the fourth stopover-clearly evinced a pre-arranged plan that was executed at the third and fourth stopovers with the full participation of OKT1, OKT2 and OKT4.

The Issue Of Common Intention Of OKT3

[48] The issue before us now is whether there was indeed common intention between OKT3 and OKT1, OKT2, and OKT4 in the commission of the offences. When we discuss common intention, s. 34 of the Penal Code comes to our minds. That section reads as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[49] Clearly, s. 34 lays down a principle of joint liability in the doing of a criminal act. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by the accused persons in furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. (*Mahbub Shah v. King Emperor* AIR 1945 PC 118).

[50] In our judgment, when s. 34 of the Penal Code is invoked, there is no requirement to prove who actually or ultimately caused the death of the deceased as was held in *Ong Chee Hoe v. PP* [1998] 4 SLR 688.

> In any case, the effect of invoking s 34 made it unnecessary to determine who exactly the actual doer of the offence in question was. In the Privy Council decision of *Barenda Kumar Ghosh v. Emperor* AIR 1925 PC 1, the court stated:
>
> > Section 34 deals with the doing of separate acts, similar or diverse, by several persons; but if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself.

[51] Common intention within the meaning of s. 34 implies a pre-arranged plan, and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases, it has to be inferred from his act or conduct or other relevant circumstances of the case. In *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17; [2010] 1 MLJ 749, Zulkefli FCJ (as he then was) held at p. 35 (CLJ); p. 764 (MLJ):

> [29] It is a well established principle of law in dealing with the criminal liability under s. 34 of the Penal Code that a pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case (see the cases of *Mahbub Sha v. Emperor* AIR 1945 PC 118 and *Suresh v. State of Uttar Pradesh* AIR 2001 SC 1344).

[52] Now reverting back to the present case, it is not in dispute that OKT3 was not at the scene when the crime against Heng and Chong was committed. However, the existence of *mens rea* and common intention among OKT3 and OKT1, OKT2 and OKT4 can be seen or inferred from the sequence of events as found by the trial judge. OKT3's involvement started with the abduction of Chong at Saujana Services Kuala Lumpur which is reflected at pp. 5-6 of the judgment of the trial judge which is along these lines:

He was at the Saujana Services' office on 12.1.2002. He waited in a small room. About 30 minutes later, Thavanathan entered the main entrance. Saying that he wanted to re-park his car, Thavanathan departed. About 15 minutes later, Thavanathan was back with Foo and a group of persons who charged into the room where he was. One of them was OKT3. Foo punched him. "They dragged me out of the office and into the lift. I was then forced into a Proton Saga. I was sandwiched between 2 persons at the back of the car." He was taken by 4 persons to the condominium. There, he was chained to a door near the toilet. Some time later, Foo arrived at the condominium. Foo kicked and punched him. He begged for a chance to put things right. Foo left at about midnight. The group who abducted him then took charge of him.

[53] The trial judge then went on at pp. 7-8 to narrate the following sequence of events which led to the abduction of Heng:

On the eve of City Day, OKT3, PW15, and 3 others took him to Kuala Lumpur in a van. He was instructed to meet Heng at a stall opposite the Goldhill Club, Jalan Ipoh. He was made to sit at a table. Heng arrived with a person known as Gan. When Heng arrived, "they" charged towards Heng. "They" hit Heng and dragged him into a Honda Accord. Later, Heng was pushed into the van, where Heng was beaten with a bat. He was also beaten. He and Heng were driven to the condominium. He and Heng were chained up. The next day, OKT3 asked Heng about the money. Heng said he took a commission for removing the money from the bank. OKT3 pressed Heng for the truth. He told OKT3 that Heng took RM107,000.00. OKT3 asked Heng who said he only took RM20,000.00. Heng was badly injured by OKT3 who said that Heng lied. OKT3 assaulted Heng with his hands and legs. Heng asked him to support his story that he only took RM20,000.00. He told OKT3 that Heng only took RM20,000.00. OKT3 was angry when told so. OKT3 threatened him with a knife which nicked his nose. The next day, Heng was badly beaten by OKT3. OKT3 asked him to urge Heng to admit that he took RM107,000.00 and to return that money to Foo. He did so. He told Heng that Foo just wanted his money back. Heng was badly injured. Foo never came to see Heng. After he and Heng were taken to the condominium, Foo never came to the condominium. He and Heng were confined in that condominium for 20 days. Prior to that, he was confined in that condominium from 12.1.02 to about 26.1.02. From 26.1.02 to the eve of City Day, he was confined in a flat (flat) at Kangkar Pulai. PW15, Sathia (PW21) and OKT3 were the principal persons who guarded him. He had no intention to escape as Foo said that he just wanted his money back.

[54] The trial judge also took pains to lay out in the grounds of judgment the evidence of two prosecution witnesses, namely, PW15 (Thanabal a/l Thangarajoo) and PW21 (Satiyan a/l Selvem) who were at the place or places where Chong and Heng were held. The involvement of OKT3 based on PW15 and PW21's evidence can be seen as follows:

"Boy" (Thanabal a/l Thangaraju - PW15) testified as follows. OKT3, who was Foo's sales manager of Foo's wine outlet, recommended him to work as a van driver for Foo. In January 2002, OKT3 instructed him to go to Kuala Lumpur with Foo, to bring back a person who had cheated Foo of RM300,000.00. He, OKT3, Foo, Raja and Balamurugan proceeded to Kuala Lumpur in 2 vehicles. They came back to Johor with Chong. Foo and OKT3 took Chong to the condominium. About 4 hours later, he and Balamurugan were back at the condominium. There, he saw Foo "hentam Chong dengan kaki dan tangan". OKT3 was present. He, OKT3, Balamurugan, and Chong passed that night in the condominium. The next morning, Foo came to the condominium with a Sikh gentleman. The following Monday, Foo took Chong to his office, where Chong was again assaulted by Foo. OKT3 was present. Thereafter, he and OKT3 took Chong to the condominium. Later, on Foo's instructions, he and OKT3 took Chong to the flat, where Chong was held for 5 days. Chong was taken by OKT3 to Foo's wine outlet, and taken back by him and OKT3 to the flat. That day, at a coffee shop, OKT3 informed him, Raja, PW21 and OKT1 to bring another person from Kuala Lumpur. "Foo yang suruh tangkap." He, OKT3, Raja, PW21, and Chong proceeded to Kuala Lumpur in a van that OKT3 had rented. They found their quarry at Jalan 1poh. OKT3 instructed Chong to telephone that person. That person came with 2 friends. OKT1, Raja, Chong and OKT3 went inside a coffee shop. There was a commotion. OKT3 brought that person (whom PW15 called Heng) into the van. They proceeded to the condominium with Chong and Heng. At the condominium, OKT3 telephoned Foo. OKT3 asked Heng as to whether he had taken Foo's money. "Heng pun macam mahu gaduh dengan OKT3." OKT3 struck Heng with his hand. Chong and Heng were tied up at night. "OKT3 sentiasa ada datang. Semasa Heng dan Chong di tahan bersama, Foo tidak pernah datang. OKT3 yang beri arahan." "Heng dan Chong dalam jagaan kami (meaning PW15 and PW21) satu minggu di condo Pasir Gudang." After that week, OKT3 telephoned and said to him that OKT1 would call at the condominium. At about 11.00 p.m., OKT1 came to the condominium and instructed Heng and Chong to dress up. OKT1 came with OKT4. Heng could not walk as he had been severely assaulted by OKT3. He and PW21 carried Heng into OKT1's red taxi. OKT1, OKT4, Heng and Chong were inside the taxi. On the telephone, he had asked OKT3 as to the place where Heng and Chong would be taken to. OKT3 replied "bawa pergi ke balai polis". He asked OKT1 as to where Heng and Chong would be taken to. OKT1 replied "ke balai polis". That was the last he saw of Heng and Chong.

Under cross-examination, PW15 testified as follows.: He could not remember the number of times that Chong telephoned Heng. Each time Chong telephoned Heng, OKT3 was by the side. Heng was chained up at night. For the duration that Heng was at the condominium, OKT3 came to the condominium (see 144NP). He was not aware if Heng was assaulted inside the rooms. But he witnessed OKT3 assaulting Heng at the hall. "Saya pernah ikat Heng dan Chong pada waktu malam". It was Chong who proposed Heng's abduction. Chong asked for a haircut and meals at restaurants. When Chong was taken to those restaurants, Chong

did not speak to the other patrons. He did not see OKT3 on 20.2.2002. It was OKT3 who telephoned and informed him that OKT1 would be at the flat. PW15 was not cross-examined by learned counsel for OKT4 (see 148NP).

Under re-examination, PW15 related as follows. There were 2 rooms in the flat. Chong was not permitted to leave the flat. Foo instructed that Heng and Chong be tied up, through OKT3. "Walau OKT3 kata dia tak mahu terlibat dalam kerja menyimpan Chong dan Heng, dia masih menyimpan mereka, dan saya masih terima arahan-arahan dari OKT3, sehingga 20.2.2002" (see 150NP).

Satiyan a/l Sellvam (PW21) testified as follows. In February 2002, he accepted an offer from OKT3 to work as a wine seller. In that month, he, OKT3, OKT1, PW15, Raja, and Chong proceeded to Kuala Lumpur, on OKT3's instructions. In Kuala Lumpur, Chong telephoned Heng. Heng came to a coffee shop. Heng, Chong and OKT3 entered a car. Thereafter, Chong, Heng, OKT3 and one other person (lelaki India) entered the van. He was seated next to the driver of the van. He heard the sounds of "pukulan". "They" proceeded to the condominium. With a key, OKT3 opened the door of the condominium. He passed that night in the condominium. The next morning, OKT3, Chong and Heng were at the condominium. In February 2002, OKT3 instructed him and PW15 to guard Chong and Heng. "Saya jaga 2 tahanan 2 minggu di condo Pasir Gudang. Selain saya, SP15 juga menjaga. OKT3 selalu pergi and balik. Sepanjang masa, saya berada dalam condo, kecuali beli makan. OKT3 yang beri arahan kepada saya dan SP15." "Minggu kedua, OKT3 takut mereka lari, dan oleh itu, OKT3 ikat rantai kaki." "Saya lihat [Heng] baring and tak boleh bangun." "Saya memang nampak OKT3 pukul SP14." On the last day that he guarded Heng and Chong, PW15 informed him that OKT3 had telephoned and instructed him (PW15) to hand Heng and Chong to OKT1. Between 11 and 12 midnight, he and PW15 handed Heng and Chong to OKT1. He and PW15 carried Heng, who could not walk, into a red taxi. The persons who came to take Heng and Chong were OKT1 and OKT4.

[55] From the above evidence as set out by the trial judge in his judgment, we are convinced that the conduct of OKT3 was intricately interwoven with the conduct of OKT1, OKT2 and OKT4 so as to prove his culpability in the commission of the offence. What is important in this case is that OKT3's conduct had nexus with the conduct of OKT1, OKT2, and OKT4 during the relevant period of the crime to attract criminal liability. The trial judge found that OKT3 was in communication with OKT1 on 20 February 2002. OKT3 had instructed PW15 and PW21 to release Chong and Heng to OKT1. Without OKT3's instruction to release Chong and Heng on 20 February 2002, Heng would have lived, at least to the next morning. Of equal importance is the trial judge's understanding of the evidence and the common intention on the part of OKT3 which existed, as evinced at pp. 196-100 of his judgment, wherein he stated:

The entire story of OKT3 that he was only marginally involved - only in some interrogation of Chong and Heng over Foo's money - could also not bear scrutiny. OKT3's evidence was that he did not enter the condominium on 12.2.2002. That was raised for the first time by OKT3 in the witness box. But then, as said, it was the unchallenged evidence of the prosecution that OKT3 was one of the persons who brought Chong to the condominium (see 70 - 71NP, and 120NP). It was OKT3's evidence that he was only at the condominium the day after 12.2.2002 - "Saya [OKT3] menyaksi hari esok yang Foo memukul. Saya cuba lepaskan". That was raised for the first time by OKT3 in the witness box. But once again, it was the unchallenged evidence of the prosecution that OKT3 was present when Foo assaulted Chong on 12.2.2002 (see 121NP). It was OKT3's evidence that PW15 telephoned him on 20.2.2002 and that, on PW15's enquiry on what to do with Chong and Heng, he said "ke balai polis". That again was raised for the first time by OKT3 in the witness box. But again it was the unchallenged evidence of the prosecution (see cross-examination by OKT3 at 111 - 113NP) that OKT3 telephoned and informed PW15 that OKT1 would be at the condominium and then instructed PW15 to release Chong and Heng to OKT1, and that OKT1 informed PW15 that Chong and Heng would be taken to the police station. It was OKT3's evidence that he struck Chong and Heng on only an occasion. That again was raised for the first time by OKT3 in the witness box. But again it was the unchallenged evidence of the prosecution that OKT3 threatened Chong with a knife that nicked Chong's nose (see 79NP) and that OKT3 seriously injured Heng on more than one occasion (see 78NP, 79NP, 124NP and 125NP). The unchallenged evidence of the prosecution was that Heng was assaulted only by OKT3 (because Foo was never at the condominium when Heng was there), and that Heng, who could not walk, was carried to the taxi from the condominium on 20.2.2002. The unchallenged evidence of the prosecution was that Heng had a fracture of his 5th rib and soft tissue bleeding in his brain space. So, OKT3 could not have been gentle to Chong and Heng, or so he claimed. OKT3's denial that he interrogated Chong and Heng and assaulted them on more than one occasion or that the Heng's injuries were not caused by him (OKT3) was again the opposite of the established evidence.

The following denials of OKT3 were also against what he had not challenged, namely, (i) that OKT3 was instrumental in PW15 and PW21 being employed by Foo (see 119NP and 141NP), (ii) that PW15 was outside the building whilst Chong was being abducted (see 120NP), (ii) that OKT3 instructed PW15 and PW21 to guard Chong and or Heng (OKT3 admitted in his examination-in-chief that he so instructed PW15 and PW21 - see 401 - 402NP), (iii) that at some time before Heng's abduction, OKT3 took Chong to Foo's winery and entered that premises (see 123NP), and (iv) that OKT3, with a key, opened the condominium door on the occasion when Chong and Heng was taken to the condominium after Heng's abduction (see 220NP). The most barefaced denial was that OKT3 would not even identify the body in photograph P12(2), although he admitted that he interrogated and assaulted Heng

with his hands and feet. OKT3 (age 42 when he testified) testified that PW15 (age 25 when he testified) and PW21 (age 24 when he testified) were not under his control. The purport of OKT3's testimony was that the incarceration of Chong and Heng was not under his control and that their release had nothing to do with him. But that story was against the overall effect of the evidence which was that OKT3 was the one in control of the condominium and the persons therein whilst Foo was not around. OKT3's story was also against the unchallenged evidence (i) that OKT3 participated in Chong and Heng's abduction, (ii) that OKT3 instructed PW15 and PW21, *albeit* on Foo's direction, to hold Chong and Heng, (iv) that PW15 and PW21 were always under OKT3's direction, (v) that OKT3 witnessed Foo's assault of Chong, (vi) that OKT3 interrogated Chong on the whereabouts and restitution of the money taken from the deposit box, (vii) that OKT3 participated in the aborted attempt to abduct Heng, (viii) that OKT3 interrogated Heng on the money taken from the deposit box, (ix) that on several occasions, OKT3 assaulted Chong and Heng, (xi) that OKT3 severely injured Heng, (xii) that OKT3 had the key to the condominium where Heng and Chong were incarcerated, (xiii) that OKT3 paid regular visits to the condominium right up to a few days before 20.2.2002, and (xiv) that OKT3 had control of PW15 and PW21 right up to the moment when PW15 and PW21 released Heng and Chong to OKT1 on 20.2.2002. That established evidence clearly made out that PW15 and PW21 would not have released Chong and Heng without OKT3's express instruction.

[56] Like the Court of Appeal, we have no reason to disturb the trial judge's finding that OKT3 had no defence and that at the end of the entire case, there was no doubt that the act committed at Jalan Kota Tinggi was committed with the common intention of OKT3, such that the act although not executed by OKT3, must also be ascribed to OKT3. It is clear that based on facts and evidence, OKT3 played a principal role in Chong and Heng's abduction and incarceration. Chong and Heng were abducted and incarcerated on account of money taken by Chong and Heng that belonged to Foo. Chong and Heng were abducted and incarcerated on the instructions of Foo. Based on the evidence recorded by the trial judge, it is clear that OKT3 participated in Chong and Heng's abduction. OKT3 witnessed Foo's assault of Chong. OKT3 assaulted Chong. OKT3 interrogated Chong on the whereabouts and restitution of the money taken from the deposit box. OKT3 participated in the aborted attempt to abduct Heng. OKT3 had the key to the condominium where Heng and Chong were incarcerated. Right up to a few days before 20 February 2002, OKT3 paid regular visits to the places where Heng and Chong were incarcerated. When Heng and Chong were incarcerated together, it was OKT3 who gave all instructions. OKT3 had control of PW15 (Thanabal a/l Tangarajoo) and PW21 (Satiyan a/l Selvem) who guarded Heng and Chong. OKT3 had control of PW15 and PW21 right up to the moment when PW15 and PW21 released Heng and Chong to OKT1 on the night of 20 February 2002. There can be no doubt that the trial judge correctly found that both charges had been proved against OKT3 beyond reasonable doubt.

A

Conclusion

[57] In the final analysis, we are of the view that the trial judge had very meticulously considered the defence of the respective accused. He was satisfied that none of the accused had cast any reasonable doubt on the prosecution's case and that the charges were proved beyond reasonable doubt. We are in complete agreement with him. In the present appeal, the trial judge had not only given reasons for rejecting the OKT1, OKT2, OKT3 and OKT4's defence but he had also directed his mind to the issue of common intention. We had considered the evidence adduced by the prosecution and we find there was more than sufficient evidence to show the existence of a pre-arranged plan between OKT1, OKT2, OKT3 and OKT4 as found by the trial judge and affirmed by the Court of Appeal.

[58] Thus, we find that the findings of facts by the trial judge are impeccable and that there is nothing regarding them which requires our curial intervention in exercise of our appellate powers. In our judgment, the trial judge had not erred in his evaluation of the evidence and the application of the law. We find no appealable error in the evaluation of the defence and in the findings of the trial judge. Taking the evidence as a whole, we find that the convictions recorded by the trial judge as affirmed by the Court of Appeal are safe.

[59] For the above reasons, we dismiss the appellants' appeals. The decisions of the learned High Court Judge and the Court of Appeal are hereby affirmed.